Supreme Court, U.S.
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NO.: OFFICE OF THE CLERK

In The

Supreme Court of The United States

JOSE A. PEREZ MENCHACA,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Jose A. Perez Menchaca
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner.

49pp

QUESTIONS PRESENTED

1. Whether the indictment was insufficient because it failed to state a criminal offense where petitioner was charged with selling gamma butyrolactone ("GBL") and by so doing, conspired to violate the Food, Drug, and Cosmetic Act ("FDC Act") by introducing a misbranded drug into interstate commerce?

2. Whether petitioner's conviction is due to be vacated because the definition of misbranded drug under the FDC Act is unconstitutionally vague as applied to his case?

3. Whether petitioner's guilty plea is due to be vacated where the district court did not inform him, nor did he know, that he was pleading guilty to a felony or misdemeanor?

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PETITION FOR WRIT OF CERTIORARI

Jose A. Perez Menchaca (Mr. Perez), respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on September 27, 2001.

OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals affirming Mr. Perez's conviction and sentence on direct appeal is reproduced in Appendix A hereto. The judgment and commitment order entered by the United States District Court for the Middle District of Florida - ORLANDO DIVISION, dated January 17, 2001, is reproduced in Appendix B.

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1). This petition presents this Court with a serious constitutional question as well as a conflict with prior decisions of this Court as more fully presented below. The

instant petition is timely and filed within the 90 day statutory limitation period.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION: FIFTH AMENDMENT

Fifth Amendment - Rights of Persons

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; . . .

TITLE 21 U.S.C., SECTION 321

§ 321. Definition; generally

For the purposes of this chapter—

* * * * * * * * * * * *

(g)(1) The term "drug" means (A) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clauses (A), (B), or (C) of this paragraph. A food or dietary supplement for which a claim, subject to sections 343(r)(1)(B) and 343(r)(3) of this title or sections 343(r)(1)(B) and 343(r)(5)(D) of this title, is made in accordance with the requirements of section 343(r) of this title is not a drug solely because the label or the labeling contains such a claim. A food dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made in accordance with section 343(r)(6) of this title is not a drug under clause (C) solely because the label or the labeling contains such a statement.

* * * * * * * * * * * *

TITLE 21 U.S.C., SECTION 331

§ 331. Prohibited acts

The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

* * * * * * * * * * * * *

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

* * * * * * * * * * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

* * * * * * * * * * * * *

TITLE 21 U.S.C., SECTION 333

§ 333. Penalties

(a) Violation of section 331 of this title; second violation; intent to defraud or mislead

(1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

(2) Notwithstanding the provisions of paragraph (1), if any person commits such a violation after conviction of him under this section becomes final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

* * * * * * * * * * * *

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY.

On September 30, 1999, a federal grand jury for the Middle District of Florida - ORLANDO DIVISION, returned a 31-count Indictment against JOSE A. PEREZ MENCHACA ("Mr. Perez"), his privately owned Delaware corporation, BONDTECH-KLEBRIG CORPORATION ("Bondtech"), and PAUL CABANISS ("Mr. Cabaniss"), alleging violations of Title 18 U.S.C. § 1001 and Title 21 U.S.C. §§ 331(a), (c), and (k), and 333(a)(2) (Count I); violation of the Federal Food, Drug, and Cosmetic Act ("FDC Act")(Count II through VI); and further charging said defendants with transporting hazardous materials in air commerce (Counts VII through XI), mail fraud (Counts XII through XVIII), structuring monetary transactions (Counts XIX through XXVI) and making false statements to a federal agency (Counts XXVII through XXXI). Forfeiture was also sought.

On July 21, 2000, the district court below, upon the Government's motion, dismissed fifteen counts of the Indictment, (Counts VII through XVIII, and XXX through XXXI).

Pursuant to a written plea agreement, Mr. Perez entered his plea of guilty as to one count of the Indictment. On January 12, 2001, the district court below sentenced Mr. Perez to a term of 38-months imprisonment, three (3) years supervised release, and a $6,000 fine.

On September 27, 2001, the Eleventh Circuit Court of Appeals affirmed Mr. Perez s conviction and sentence by an unpublished opinion. *See* App. A(1). The mandate was issued by the Court on October 26, 2001.

The instant petition timely followed. Mr. Perez is currently serving his federal sentence at a federal correctional institution known as FCC-Coleman (LOW), Coleman, Florida. The Custodian is R.D. SWOPE.

II. FACTS.

In October, 1996, Mr. Perez established a website on the Internet, offering for sale alternative health products, *i.e.*, Dehydroepiandosterone ("DHEA"), Kemdalyn, Rodakinone, etc. The common reference or term of the aforementioned products was/is "Food Supplements."

A month later, Mr. Perez was offered an opportunity from a third party, via the Internet, to sell and distribute kits containing gamma butyrolactone ("GBL") and two other chemicals, sodium hydroxide and potassium hydroxide, through the mail in order to enable the end user to make gamma hydroxybutyrate ("GHB").

Mr. Perez consulted with his civil attorney regarding the laws regulating the aforementioned chemicals and subsequent sale to the general public, via the mails. Mr. Perez was informed by his counsel that there was no federal regulation prohibiting him from offering for sale and distributing to his customers GBL or GHB.

Thereafter, Mr. Perez began offering for sale the above described kits, advertising that GHB "cured alcoholism and depression, induced sleep and heightened sexual feelings, burned body fat, extended human life, and increased muscle size and mass." *See* Appendix A, page App. 3.

Following the advertisements of the kits on the Internet, Mr. Perez, by and through his privately owned Delaware corporation, BONDTECH-KLEBRIG CORPORATION, sold thousands of the kits. The method of production and distribution was quite simple. An individual in New York manufactured the kits containing pre-measured ingredients to make GHB, shipped the kits to Mr. Perez's place of operation, his home, where Mr. Perez inserted mixing instructions in the kits and shipped the kits to the customers throughout the United States, via a private courier, FEDERAL EXPRESS.

The United States Food and Drug Administration ("FDA") learned of Mr. Perez's activities and commenced a criminal investigation. At the conclusion of the FDA's investigation, the Government indicted Mr. Perez for violation of Title 21 U.S.C. §§§ 321(g)(1)(B)-(D), 331 and 333 as well as violation of the mail fraud statutes.

The Government and Mr. Perez entered into a plea agreement where he would plead guilty to count one of the Indictment. Mr Perez later entered his guilty plea before the district court below and was sentenced to prison.

On appeal, Mr. Perez contended that his conviction should be vacated because the definition of misbranded drug under the FDC Act is unconstitutionally vague as applied to his case. He also claimed that his guilty plea was not voluntarily, knowingly, or intelligently made, *i.e.*, with a full comprehension check, since he did not know whether he was pleading guilty to a misdemeanor or a felony, requiring his conviction and sentence to be vacated. His last challenge was that the indictment was insufficient because it failed to state a criminal offense, citing GHB was a dietary supplement instead of a drug and, therefore, selling of GHB cannot support a charge of conspiring to violate the FDC Act.

The Eleventh Circuit, recognizing that the issues attacking the FDC Act were of first impression, and the absence of any case law in this Court on the vagueness of the definition of "drug" under § 321 and its affect upon the constitutionality of a prosecution for misbranding drugs with the intent to defraud or mislead under § 331 and § 333, nonetheless affirmed Mr. Perez's conviction and sentence.

This case is now properly before this Court for review.

REASONS FOR GRANTING THE PETITION

Petitioner, JOSE A. PEREZ MENCHACA, respectfully requests this Court to grant the instant petition based on the constitutional challenge to the criminal statutes 21 U.S.C. § 321(g)(1)(B)-(D), § 331 and § 333; that is, the statutes are impermissibly vague as applied to the facts of his case.

The Government charged Mr. Perez with selling "kits" containing gamma butyrolactone ("GBL") to make gamma hydroxybutyrate ("GHB"), all in violation of the Food, Drug, and Cosmetic Act ("FDC Act")(§ 321, § 331, and § 333).

On appeal, the Eleventh Circuit noted that "[w]hether the classification of GHB and GBL as drugs under the FDC Act is proper is an issue of first impression." App. A(4). The appellate court below opined that since Mr. Perez and his company touted GHB and GBL as a cure for alcoholism and depression as well as assisting in the building of muscle mass GHB and GBL clearly and plainly fell within the boundaries of the term "drugs" as defined under the FDC Act. Furthermore, the Eleventh Circuit held that the FDC Act was not unconstitutionally vague as applied to the case *sub judice*, citing that "[n]o case law in th[at] Circuit or in the Supreme Court discusses the vagueness of the definition of "drug" under § 321 and its affect upon the constitutionality of a prosecution for misbranding drugs with the intent to defraud or mislead under § 331 and § 333." App. A(5).

However, the FDC Act, under § 321(g)(1) defines the term "drug" to mean those chemicals or ingredients found in the official Pharmacopoeia or any supplement thereto. GHB and GBL are not referenced or specifically named in any of the official publications cited in the aforementioned criminal statute. Further, the statute does not differentiate between the affects of food and other articles, which could be used to change the function or structure of the body of man or animal.

How then is a reasonable citizen to know what conduct he or she engages in will create the requisite liability under the FDC Act?

Recently, the Tenth Circuit confronted with a challenge to a different section under the FDC Act, held that "the use of the word 'article' [under § 321(g)(1)(A) - (D)] creates ambiguity. . . The drafters could have clarified their intent by using facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710 (1975). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547 (1974). "The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Hoffman Estates v. Flipside Hoffman Estates*, 455 U.S. 489, 495 n.6b, 71 L.Ed. 2d 362, 369 n.7, 102 S.Ct. 1186 (1982)(*quoting Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686 (1971).

This Court has held a statute to be vague when the Government has "fail[ed] to provide such minimal guidelines" that would prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855 (*quoting Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242 (1974)(alterations in the original). The criminal

statute in the instant case is such a law, Mr. Perez contends, because the meanings of the term "drug," "article" and/or "food" are not clear, but plainly ambiguous and vague.

Here, the Legislative enactments failed to articulate the aforementioned terms "with a reasonable degree of clarity to reduce the risk of arbitrary enforcement and allow individuals to conform their behavior to the requirements of the law." *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244 (1984).

This Court has on several occasions firmly rejected laws for vagueness. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849 (1999)("Chicago ordinance that prohibited loitering in any public place by two or more people, of whom at least one was criminal street gang member, held to be impermissibly vague, in violation of Fourteenth Amendment's due process clause."); *Kolender*, 461 U.S. 352, 103 S.Ct. 1855 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839 (1972); *Gregory v. City of Chicago*, 394 U.S. 111, 89 S.Ct. 946 (1969); and *Robinson v. State of California*, 370 U.S. 660, 82 S.Ct. 1417 (1962).

Here, this Court as well as a federal circuit and district court have concluded that the term "article" or "drug" or "food" is overly broad and simply vague and ambiguous. *Pharmanex v. Shalala*, 221 F.3d 1151, 1155 (10th Cir. 2000); *Pharmanex v. Shalala*, 35 F.Supp.2d 1341, 1346 (D.Utah 1999); and *United States v. Generix Drug Corp.*, 460 U.S. 453, 103 S.Ct. 1298 (1983).

Mr. Perez could not, nor could any reasonably educated person have concluded, after reading the FDC Act (§ 321(g)(1)), that by placing GBL in a kit, with instructions to make GHB, was prohibited conduct under the law. His guilty plea pursuant to a written plea agreement does not obviate the need to review nor did he waive his right to have this Court reach the constitutional challenge to the FDC Act under the void-for-vagueness doctrine. Instead of using the more precise terms such as 'product' and 'active ingredient' or some combination of the terms, the drafters, opted for the more general expression 'article.' This suggests ambiguity. *Pharmanex v. Shalala*, 221 F.3d at 1155.

In *United States v. Generix Drug Corp.*, the Court held that §321(g)(1) is "plainly broad enough to describe a completed drug product." *Id.*, at 458, 103 S.Ct. 1298. The inclusion of drug product within the ambit of § 321(g)(1) does not resolve the question of the exclusion of drug ingredient, and is thus irrelevant to the question before this Court. The decision in *Generix* and *USV Pharm. Corp. v. Weinberger*, 412 U.S. 655, 664, 93 S.Ct. 2498 (1973), did not elucidate the meaning of "drug" in such a way that precludes a reasonable person to know that the possession of GBL, the ingredient to make GHB, was within the ambit of § 321(g)(1).

The constitutional requirement that laws be reasonably precise as to the scope of prohibited conduct serves three distinct purposes:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly Second, ... [a] vague law impermissibly delegates basic policy matters to policeman, judges, and juries, for resolution on an ad hoc and subjective abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294 (1972)(internal citations and quotations omitted). A statute violates due process of law if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126 (1926). Fair notice, of course, is a right of federal constitutional dimension, grounded in the due process guarantee, established by this Court, and requiring that a criminal statute "give fair warning of the conduct that it makes a crime." *Bouje v. City of Columbia*, 378

U.S. 347, 350, 84 S.Ct. 1697, 1701 (1964); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926)(striking down on due process grounds a state criminal statute that was insufficiently "explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.")

Considering the aforementioned decisions of the federal courts which held the terms "drug," "article," and "food" under the FDC Act are ambiguous at best, it is clear that Mr. Perez' prosecution below violated the due process clause of the Fifth Amendment to the United States Constitution. Mr. Perez urges this Court to find that the FDC Act as applied to the facts of his case is unconstitutionally and impermissibly vague, requiring the judgment of the court below to be vacated.

Failure to inform Petitioner that he is pleading guilty to a misdemeanor or felony constitutes plain error.

Mr. Perez failed to object to the Rule 11 colloquy or move to withdraw his plea prior to sentencing. Hence, he must now show plain error in order to obtain the relief. *See United States v. Chubbuck*, 252 F.3d 1300, 1302 (11th Cir. 2001). Plain error is clear or obvious and affects those substantial rights that call into question the "fairness, integrity, or public reputation of judicial proceedings." *United States v. Hernandez*, 896 F.2d 513, 523 (11th Cir. 1990)(*quoting United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038

(1985)). Mr. Perez bears the burden of persuasion. *United States v. Quinones*, 97 F.3d 473, 475 (11th Cir. 1996)(*per curiam*).

In *Chubbuck*, the Eleventh Circuit opined:

> "After weighing his options, a defendant may for one reason or the other find it advantageous to plead guilty despite potential gaps in the government's ability to present evidence. Therefore in analyzing a guilty plea, the real question in this case is whether the plea was made voluntarily, knowingly, and intelligently."

Chubbuck, 252 F.3d at 1302 (*citing McCarthy v. United States*, 394 U.S. 459, 462-63, 89 S.Ct. 1166 (1969).

No simple or mechanical rule determines whether the district court complied with Rule 11's mandate to satisfy itself that Mr. Perez understood the nature of the charges against him. *McCarthy*, 394 U.S. at 467 n.20, 89 S.Ct. 1166, 1171 n.20. Rather, the inquiry varies from case to case depending on "the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence." *United States v. Bell*, 776 F.2d 965, 968 (11th Cir. 1985).

This Court has recognized that three core concerns underlie a Rule 11: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the

charges; and (3) the defendant must know the consequences of his plea. A court's failure to address any one of these concerns requires automatic reversal. *McCarthy*, 394 U.S. 459, 89 S.Ct. 1166.

In the case *sub judice*, Mr. Perez's co-defendant had pleaded guilty to certain charges under the indictment (violation of the FDC Act), which, as the record demonstrates and the Government highlighted the Eleventh Circuit on direct review, the conviction was a misdemeanor. Mr. Perez, a native of Argentina, and a first time visitor to the criminal system and courts, pleaded guilty to one of the counts of the indictment, not knowing that the conviction was a felony and would obliterate many of his civil rights as a citizen of this country, *i.e.*, the right to vote, bear arms, the increased social opprobrium that accompanies the higher degree of criminal culpability and conviction assigned to him. The heretofore described consequences, direct or collateral in nature, should have been made known to Mr. Perez prior to the acceptance of his guilty plea by the district court below.

In other terms, it is plain and obvious that the third core concern aforementioned (under Rule 11) was breached, constituting plain error and requiring automatic reversal. *See McCarthy*, generally.

The Eleventh Circuit failed to apply the last prong of Rule 11 (concern) to the facts of Mr. Perez's case below. In light of this omission, but more importantly, the failure by the district court to inform Mr. Perez of the consequences of his

guilty plea and conviction of the charged offense, rendered his plea not knowingly, voluntarily and/or intelligently made, *i.e.*, without a full comprehension check. Having said that, it should be axiomatic that Mr. Perez's conviction is due to be vacated, affording him the opportunity to plead anew.

CONCLUSION

WHEREFORE, Mr. Perez respectfully requests that the Court grant the instant petition for writ of certiorari based on the foregoing argument and law; and enter an order granting same, vacating the judgment of the appellate court below, and remanding the case to the court below for further proceedings consistent with this Court's opinion. Mr. Perez requests other and further relief this Court deems just and proper.

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PETITIONER.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-10370

Non-Argument Calendar

D.C. Docket No. 99-001 89-CR-ORL-9

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE A. PEREZ MENCHACA,
a.k.a. Jose A. Perez,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

(September 27, 2001)

Before TJOFLAT, CARNES and BLACK, Circuit Judges.

PER CURIAM:

Jose A. Perez was indicted in a 31-count indictment involving offenses stemming from an operation to sell "kits" containing gamma butyrolactone ("GBL") to make gamma hydroxybutyrate ("GHB"). Perez entered into a plea agreement, wherein he agreed to plead guilty to Count 1 of the indictment in exchange for the dismissal of the remaining counts against him. Both the terms of the plea agreement and the change-of-sentencing hearing in the district court addressed the maximum sentence that Perez could receive, the fact that the sentence would be determined by applying the applicable sentencing guidelines, the meaning of the sentence-appeal waiver, and the contents of the factual proffer to support a guilty plea to Count 1. Applying sentencing enhancements and reductions, the district court determined that Perez' guideline range, based on a total offense level of 20, was 33 to 41 months. It sentenced Perez to 38 months' imprisonment.

Proceeding pro se, Perez now appeals his conviction and 38-month sentence on five grounds. First, he contends that the indictment was insufficient because it failed to state a criminal offense. Specifically, he argues that GHB is a dietary

supplement instead of a drug and, therefore, that the selling of GHB cannot support a charge of conspiring to violate the Food, Drug, and Cosmetic Act ("FDC Act") by introducing a misbranded drug into interstate commerce, as charged in Count 1 of the indictment. Because Perez challenges his indictment for the first time on appeal, the indictment must be held sufficient unless it is so defective that it does not, by any reasonable construction, charge the offense to which Perez pleaded guilty. See United States v. Pease, 240 F.3d 938, 943 (11th Cir. 2001).

Whether the classification of GHB and GBL as drugs under the FDC Act is proper is an issue of first impression. The FDC Act defines "drug" to include (1) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, (2) articles (other than food) intended to affect the structure of any function of the body of man or other animals, and (3) articles intended for use as a component of any article otherwise defined as drug. 21 U.S.C. § 321 (g)(I)(B)-(D). The plain language of that statute supports a finding that GHB and GBL were properly classified as drugs in the indictment. The indictment clearly indicated that Perez and his co-conspirators represented that GHB "cured alcoholism and depression, induced sleep and 'heightened sexual feelings,' burned body fat, extended human life, and increased muscle size and mass," and, thus, was a drug under the statute. Further, GBL was defined as a drug by the indictment because it was "an

article intended for use as a component of GHB." Moreover, Perez' plea agreement contained a factual basis for the plea because Perez admitted that he knew his customers were using the GHB in a manner consistent with the description contained in the indictment. Therefore, the indictment sufficiently charged Perez with a conspiracy offense under 18 U.S.C. §371.

Second, Perez contends that his conviction should be vacated because the definition of misbranded drug under the FDC Act is unconstitutionally vague as applied to this case. Because Perez did not challenge the constitutionality of the statute in the district court, we review that argument only for plain error. See United States v. Reynolds, 215 F.3d 1210, 1212(11th Cir.), cert. denied, 531 U.S. 1000, 121 S. Ct. 500 (2000). Under plain-error review, four prongs must be met: (1) there must be error; (2) the error must be plain; (3) the error must affect the appellant's substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. United States v. Gallego, 247 F.3d 1191, 1196 (11th Cir. 2001) (citations omitted). An error can be plain under current law only if there is clear precedent from this Court or the Supreme Court resolving the issue. United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000).

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct

is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 5. Ct. 1855, 1858 (1983) (citations omitted). In this case, Perez has provided no authority showing that the definition of "drug" is unconstitutionally vague, and he has provided no reason why an ordinary person could not understand that GHB and GBL, as sold to enhance body functions in the manner described in the indictment and plea agreement, would not fall under the definition of "drug" under § 321(g)(l). No case law in this Circuit or in the Supreme Court discusses the vagueness of the definition of "drug" under § 321 and its affect upon the constitutionality of a prosecution for misbranding drugs with the intent to defraud or mislead under § 331 and § 333. Accordingly, Perez' conviction for conspiring to violate the act did not result in plain error. See Aguillard, 217 F.3d at 1321 (error is only plain if there is clear precedent resolving the issue).

Third, Perez contends that his guilty plea was not entered into knowingly and voluntarily. Because he did not object to the acceptance of his guilty plea in district court, we review his plea only for plain error. United States v. Mosley, 173 F.3d 1318, 1322 (11th Cir.1999). A knowing and voluntary plea requires satisfaction of three core principles: "(1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea." United States v. Jones, 143 F.3d 1417, 1418-

19 (11th Cir. 1998). The plea colloquy properly satisfied those principles, and Perez' three arguments to the contrary fail.

His first argument, that he did not know whether he was pleading guilty to a misdemeanor or a felony, is without merit. He has failed to cite to, and we have not found, any authority to demonstrate why the classification of his crime as a misdemeanor or a felony would affect his understanding of the charges against him, the consequences of his plea, or otherwise result in coercion to plead guilty, given that he was correctly advised of the sentence range. The district court clearly explained that the offense to which Perez pleaded guilty carried a maximum sentence of five years' imprisonment. Of course, that means the offense is a felony. See 18 U.S.C. § 3559(a)(5). The failure to specifically inform that Perez was pleading guilty to a crime classified as a felony and not a misdemeanor was not plain error. See Aguillard, 217 F.3d at 1321.

Perez' second argument, that he was unaware GHB was found naturally in mammalian tissue when he pleaded guilty, is also without merit. The manner in which GHB was utilized resulted in its classification as a drug under the FDC Act. Accordingly, the natural occurrence of GHB would not have been relevant to establishing the factual basis for the offense to which Perez pleaded guilty or the validity of the charges levied against Perez.

Perez' third argument, that he was unaware that he would be sentenced based upon an amount of victim loss

equaling $164,896 and that his guideline range would be beyond 0-6 months, likewise lacks merit. When determining whether a defendant understands the consequences of a plea, the district court is not required to inform him of an estimate of his sentencing guideline range; it need only advise the defendant of the existence of the sentencing guidelines and the fact that they would affect his sentence. See Mosley, 173 F.3d at 1327-28. The district court informed Perez that he could be sentenced up to the five-year maximum penalty, and that it could not determine the exact guideline range for his case until after the presentence investigation report was completed. The court further informed him that, when calculating his guidelines sentence, it would take into account various factors, including the effect of his offense upon the victims of it. The district court did not plainly err in finding that Perez' guilty plea was entered into knowingly and voluntarily.

Perez' fourth contention challenges the application of the sentencing enhancements that the district court applied in determining his guideline sentence. But his plea agreement contained a provision waiving his right to appeal his sentence except in limited circumstances, none of which exist here. We have recognized that appeal waivers are valid if entered into knowingly and voluntarily. United States v. Buchanan, 131 F.3d 1005, 1008 (11th Cir. 1997). For such waiver to be valid, a district court must specifically question the defendant concerning the sentence appeal waiver during the plea colloquy, unless it is otherwise clear from the record that the

defendant understood the significance of the waiver. Id. The record shows that the district court specifically questioned Perez regarding the waiver to ensure that he entered into the waiver knowingly and voluntarily. Accordingly, that waiver was valid. Because none of Perez' challenges to his sentence falls into the limited issues reserved for appeal by the appeal waiver, Perez has waived his right to challenge his sentence based upon the grounds he now asserts.

Finally, Perez contends that the district court constructively amended the indictment by basing his sentence upon conduct that was not part of the conduct to which he pleaded guilty. Perez misunderstands the concept of a constructive amendment to the indictment, which occurs when a district court provides jury instructions that so modify the elements of the charged offense that a defendant may have been convicted on a ground not alleged in the indictment. See United States v. Simpson, 228 F.3d 1294, 1299 (11th Cir. 2000). In this case, Perez pleaded guilty to the indictment, and no constructive amendment to the indictment occurred.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

6:99-cr-189-Orl-22JGG

-vs-

JOSE A. PEREZ MENCHACA
a/k/a: Jose A. Perez

William J. Sheaffer, Esquire (Retained)
609 E. Central Boulevard
Orlando, Florida 32801

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant pleaded guilty to Count One of the Indictment. Accordingly, the defendant is adjudged guilty of such count which involves the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE OFFENSE
18 USC 371	Conspiracy to Introduce a Misbranded Drug Into Interstate Commerce

DATE OFFENSE
CONCLUDED COUNT
Oct. 1997 One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

Counts Two through Six and Nineteen through Twenty-Nine are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.	583-51-9346
Date of Imposition of Sentence:	January 12, 2001
Defendant's Date of Birth:	05-25-51
Deft's U.S. Marshal No.:	241 72-018

Defendant's Mailing Address:
321 Alba Lane
Lake Mary, Florida 32746

/s/

ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

JOSE A. PEREZ MENCHACA Page _ of _
6:99-cr- 189-Orl-22JGG

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY-EIGHT (38) MONTHS.

The Court recommends to the Bureau of Prisons that the defendant be designated to a facility in Central Florida where he may be near his family.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on or before 2:00 P.M. on February 15, 2001, as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on 2-15-01 VS to FCC COL
at _____, with a certified copy of this judgment.

/s/ R.D. Swope, Warden
UNITED STATES MARSHAL

By: /s/
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The mandatory drug testing requirements are suspended based on the defendant's posing a low risk of future substance abuse.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the Instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such

substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

No additional conditions of supervised release were imposed.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The

defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$100	$6,000.00	

The Special Assessment shall be due immediately.

FINE

A fine in the amount of $6,000.00 is imposed.

RESTITUTION

No restitution was ordered. No restitution was ordered. The Court finds that determining the amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution is outweighed by the burden on the sentencing process.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) non-federal restitution; (3) federal restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

Payment of the total criminal monetary penalties shall be due as follows:

✓ In full and due immediately.

Any payment ordered under Part II, must comply with 18 U.S.C. § 3572, 18 U.S.C. § 3664(n), and include a provision under 18 U.S.C. § 3664(k) in which defendant must notify the court of any material changes in defendant's economic circumstances. Upon such notice, the Court may adjust the installment payment schedule.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A):

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed. All criminal monetary

penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The Court granted the defendant only 1 level for acceptance of responsibility due to his false testimony in Court.

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 20
Criminal History Category: 1
Imprisonment Range: 33 to 41 months
Supervised Release Range: 2 to 3 years
Fine Range: $7,500 to $75,000

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

[ ] The court finds pursuant to 18 U.S.C. § 3364(f)(3)(B) that the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments and is therefore ordering only nominal payments be made.

[ ] Restitution is not ordered because:

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3863(a)(l)(A) and the court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i), determining an order of restitution not to be appropriate.

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3563(a)(1)(A) and court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(l); pursuant to 18 U.S.C. § 3663(s)(1)(B)(ii), It has been determined that the complication and

prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims.

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3863A(c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(A). the court finds from facts on the record that the number of identifiable victims is so large as to make restitution impracticable.

[ ] the defendant was convicted of a qualifying, offense under 18 U.S.C. § 3663A(c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3883A(c)(3)(B), the court finds from facts on the record that determining complex issues of fact related to the cause or amount of the victims losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance. [Departure to Level *]

[ ] for the following reason(s):